

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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BRANCH BANKING AND TRUST
COMPANY,

Plaintiff,

v.

YOEL INY, *et al.*,

Defendants.

Case No. 2:11-cv-01777-MMD-VCF

ORDER

(Pl.'s Motion for Partial Summary
Judgment – dkt. no. 85;
Pl.'s Motion for Hearing — dkt. no. 86;
Defs.' Motion for Summary Judgment —
dkt. no. 87)

I. SUMMARY

This case involves an alleged breach of guaranty after the borrower defaulted, sought Chapter 11 protection and sold the property that secured the debt pursuant to an order from the bankruptcy court. Before the Court are two competing motions for summary judgment (dkt. nos. 85, 87). Plaintiff Branch Banking and Trust Company moves for partial summary judgment on its claim for breach of a guaranty (“Plaintiff’s Motion”). (Dkt. no. 85.) Plaintiff also requests a valuation hearing. (Dkt. no. 86.) Defendants¹ seek summary judgment on all of Plaintiff’s claims (“Defendants’ Motion”). (Dkt. no. 87.) The Court has reviewed the applicable response and reply briefs. (Dkt. nos. 91, 92, 99, 100.) Additionally, the Court has considered Defendants’ evidentiary

¹Defendants are Yoel Iny, individually and as trustee of the Y&T Family Trust; Noam Schwartz, individually and as trustee of the Noam Schwartz Trust; D.M.S.I., L.L.C.; and Does 1 through 10.

objection to a declaration submitted in support of Plaintiff's Motion (dkt. no. 90), as well as Plaintiff's response (dkt. no. 98) and Defendants' reply (dkt. no. 101). The Court has also reviewed supplemental briefing filed by both parties (dkt nos. 104, 109, 110). Finally, the Court has considered oral arguments offered during a hearing held on October 8, 2015. (Dkt. no. 115.) For the reasons discussed below, Plaintiff's Motion (dkt. no. 85) and request for a valuation hearing (dkt. no. 86) are granted, Defendant's Motion (dkt. no. 87) is denied, and the evidentiary objections are overruled.

II. BACKGROUND

A. Factual Background

On January 11, 2007, borrower GAC Storage Lansing, LLC ("the Borrower") executed a promissory note ("Note") and a Construction Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing ("Mortgage") with creditor Colonial Bank, N.A. (Dkt. no. 85 at 3–4; dkt. no. 57 at 3.) The Note had a principal amount of \$4,333,000; the Mortgage encumbered real property in Illinois ("the Property").² (Dkt. no. 85 at 3-4.) The same day, Defendants Yoel Iny (individually and as trustee of the Y&T Family Trust), Noam Schwartz (individually and as trustee of the Noam Schwartz Trust), and D.M.S.I., L.L.C. executed a guarantee ("Guarantee") with Colonial Bank, N.A. (*Id.*; dkt. no. 57 at 3.)

In 2009, Colonial Bank — which Plaintiff alleges was a successor to Colonial Bank, N.A., following the entity's transformation from a national banking association to a state banking corporation — was closed by the Alabama State Banking Department. (See dkt. no. 85-2 at 13-23.) The Federal Deposit Insurance Corporation ("FDIC") became the receiver to liquidate and distribute Colonial Bank's assets. (*Id.* at 13.) The FDIC, in turn, assigned some of those assets to Plaintiff. (*Id.*) Plaintiff contends that the

²Defendants filed a separate evidentiary objection to Plaintiff's Motion, contending that one of Plaintiff's declarations and its accompanying documents contain various evidentiary problems. (Dkt. no. 90.) Although the Court cites Plaintiff's Motion and its attachments in outlining the background facts, the Court notes that Defendants appear to dispute the admissibility of evidence upon which Plaintiff relies. The Court addresses Defendants' evidentiary objections below.

1 Borrower's Note, Mortgage, and Guarantee were among those assets. (Dkt. no. 85 at 4–
2 5; dkt. no. 85-2 at 13–15.)

3 The Borrower defaulted on the Note; it subsequently filed for Chapter 11
4 bankruptcy on October 7, 2011. (Dkt. no. 85 at 5; dkt. no. 85-3 at 26.) A week later, on
5 October 18, 2011, Plaintiff initiated a judicial foreclosure action in Illinois. (Dkt. no. 91-2
6 at 9.) In light of the Borrower's bankruptcy filing, the Illinois court stayed Plaintiff's judicial
7 foreclosure action. (*Id.*) Although Plaintiff sought relief from the stay in February 2012 (*id.*
8 at 4-19), Plaintiff eventually reached a settlement agreement with the Borrower in the
9 bankruptcy action. (Dkt. no. 87-2.) The settlement agreement — which the bankruptcy
10 court approved in March 2013 — included certain procedures for selling the Property by
11 the Borrower. (*Id.*) In July 2013, the bankruptcy court approved the sale of the Property
12 for \$3,425,000, finding that the Borrower had marketed and entertained bids for the
13 Property according to the settlement terms. (Dkt. no. 87-3.) The Property's sale price
14 was lower than the balance on the Note.

15 **B. Procedural Background**

16 Plaintiff initiated this action against Defendants as guarantors on November 4,
17 2011. (Dkt. no. 1.) Defendants moved to stay the proceedings pending decisions on
18 relevant state statutes from the Nevada Supreme Court. (Dkt. no. 39.) The Court granted
19 a stay on December 19, 2012 (dkt. no. 43); almost a year later, on November 26, 2013,
20 the Court lifted the stay pursuant to Defendants' motion. (Dkt. nos. 48, 49.)

21 The parties then agreed to give Defendants leave to file a second answer to the
22 Amended Complaint, in which Defendants asserted a counterclaim alleging that Plaintiff
23 had promised to "address and work-out certain Colonial Bank loans." (Dkt. no. 57 at 10.)
24 Plaintiff filed a motion to dismiss the counterclaim (dkt. no. 61), which the Court granted,
25 finding that the oral agreement at issue in the counterclaim was unenforceable under the
26 statute of frauds. (Dkt. no. 70.) The Court further held that Defendants had failed to state
27 a claim for promissory estoppel in their counterclaim. (*Id.* at 6-7.)

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1 The Court now addresses the parties' motions for summary judgment (dkt. nos.
2 85, 87) and Plaintiff's request for a valuation hearing (dkt. no. 86).

3 **III. MOTIONS FOR SUMMARY JUDGMENT**

4 The parties' motions for summary judgment raise the same legal questions as to
5 whether Defendants, as guarantors, can invoke certain provisions of Nevada's anti-
6 deficiency statutes in light of the Property's sale in the bankruptcy proceedings. The
7 Court will therefore address the legal issues before turning to any factual disputes.

8 **A. Legal Standard**

9 "The purpose of summary judgment is to avoid unnecessary trials when there is
10 no dispute as to the facts before the court." *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*,
11 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when "the movant
12 shows that there is no genuine dispute as to any material fact and the movant is entitled
13 to judgment as a matter of law." Fed. R. Civ. P. 56(a); see *Celotex Corp. v. Catrett*, 477
14 U.S. 317, 322–23 (1986). An issue is "genuine" if there is a sufficient evidentiary basis
15 on which a reasonable fact-finder could find for the nonmoving party and a dispute is
16 "material" if it could affect the outcome of the suit under the governing law. *Anderson v.*
17 *Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). Where reasonable minds could differ
18 on the material facts at issue, however, summary judgment is not appropriate. See *id.* at
19 250-51. "The amount of evidence necessary to raise a genuine issue of material fact is
20 enough 'to require a jury or judge to resolve the parties' differing versions of the truth at
21 trial.'" *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat'l*
22 *Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288–89 (1968)). In evaluating a summary
23 judgment motion, a court views all facts and draws all inferences in the light most
24 favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793
25 F.2d 1100, 1103 (9th Cir. 1986).

26 The moving party bears the burden of showing that there are no genuine issues
27 of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). "In
28 order to carry its burden of production, the moving party must either produce evidence

1 negating an essential element of the nonmoving party's claim or defense or show that
2 the nonmoving party does not have enough evidence of an essential element to carry its
3 ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210
4 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56's requirements,
5 the burden shifts to the party resisting the motion to "set forth specific facts showing that
6 there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. The nonmoving party "may
7 not rely on denials in the pleadings but must produce specific evidence, through
8 affidavits or admissible discovery material, to show that the dispute exists," *Bhan v. NME*
9 *Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and "must do more than simply show
10 that there is some metaphysical doubt as to the material facts." *Orr v. Bank of Am.*, 285
11 F.3d 764, 783 (9th Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
12 475 U.S. 574, 586 (1986)). "The mere existence of a scintilla of evidence in support of
13 the plaintiff's position will be insufficient." *Anderson*, 477 U.S. at 252.

14 **B. Discussion**

15 **1. Evidentiary Objection**

16 As a threshold matter, the Court overrules Defendants' evidentiary objections to
17 the Declaration of Peter Nugent ("Nugent Declaration") (dkt. no. 85-1). (See dkt. no. 91
18 at 14-15; dkt. no. 90.) Defendants argue that the Nugent Declaration fails to authenticate
19 its various attachments because Mr. Nugent lacks personal knowledge required to
20 authenticate those documents. (Dkt. no. 91 at 14-15.) Indeed, "unauthenticated
21 documents cannot be considered in a motion for summary judgment." *Orr*, 285 F.3d at
22 773. A document must be authenticated "by evidence sufficient to support a finding that
23 the matter in question is what its proponent claims." *Beyene v. Coleman Sec. Servs.,*
24 *Inc.*, 854 F.2d 1179, 1182 (9th Cir. 1988) (quoting Fed. R. Evid. 901(a)). A witness can
25 gain personal knowledge of a document if he or she "wrote it, signed it, used it, or saw
26 others do so." *Orr*, 285 F.3d at 774 n.8 (quoting 31 Wright & Gold, *Federal Practice &*
27 *Procedure: Evidence* § 7106, 43 (2000)).

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1 The Court finds that Mr. Nugent has sufficiently authenticated the loan documents
 2 attached to his declaration. Mr. Nugent asserts that he “direct[s] the maintenance and
 3 storage of [Plaintiff’s] books, records, and files as they relate to” the loan at issue in this
 4 case. (Dkt. no. 85-1 at 3.) He further asserts that he is “familiar with [Plaintiff’s] books,
 5 records, and files as they relate to the loan sued upon herein,” and that he is “familiar
 6 with, and [has] gained knowledge of, the business records [and] the books, records, and
 7 files [that Plaintiff] acquired from the FDIC.” (*Id.*) These statements indicate that Mr.
 8 Nugent has the personal knowledge required to authenticate the disputed documents.

9 **2. Legal Disputes**

10 The parties’ Motions collectively raise three main threshold legal questions. First,
 11 are Defendants entitled to assert the equitable defenses enumerated in NRS
 12 § 40.495(3), which are available to guarantors when a creditor “maintains an action to
 13 foreclose or otherwise enforce a mortgage or lien”? NRS § 40.495(3), *amended by* 2015
 14 Nev. Stat., Ch. 518, Sec. 13 (Westlaw).³ Second, assuming those equitable defenses
 15 are available, can Defendants argue that Plaintiff is time-barred from seeking a
 16 deficiency judgment under NRS § 40.455(1), which requires a creditor to seek a
 17 deficiency judgment “within 6 months after the date of the foreclosure sale or the
 18 trustee’s sale”? NRS § 40.455(1), *amended by* 2015 Nev. Stat., Ch. 518, Sec. 8
 19 (Westlaw). Finally, is Plaintiff’s recovery limited by NRS § 40.455(1)(c), which, at the
 20 time of the Property’s bankruptcy sale, limited the amount that a successor creditor could
 21 recover through a deficiency judgment? 2011 Nev. Stat. 1743.⁴

22 ³Sections 40.495 and 40.455 were recently amended. 2015 Nev. Stat., Ch. 518,
 23 Secs. 8, 13. (Westlaw). The 2015 amendments reflect changes to the definition of
 24 “foreclosure sale” in another section of the amending act. These amendments do not
 25 affect the analysis in this case, where the sale of the Property took place in 2013. See
 26 *Sandpointe Apartments v. Eighth Judicial Dist. Court*, 313 P.3d 849, 851, 857–59 (Nev.
 27 2013) (concluding that a different anti-deficiency statute passed in 2011 could apply only
 28 prospectively in light of a strong presumption against retroactive application).

⁴Section 40.459 was amended and reorganized in May 2015. See 2015 Nev.
 Stat., Ch. 149, Sec. 1 (Westlaw) (codified as amended at NRS § 40.459). Subsection
 (1)(c) now appears in NRS § 40.459(3)(c), which limits a successor creditor’s recovery
 after obtaining a deficiency judgment on a “property upon which the debtor, guarantor or
 surety maintains his or her principal residence.” NRS § 40.459(3)(c).

1 **a. Equitable Defenses Under NRS § 40.495(3)**

2 Nevada’s anti-deficiency statutory scheme provides certain protections for
3 guarantors. Section 40.495 allows a creditor to bring an action separate from a
4 foreclosure action against a guarantor to enforce “that person’s obligation to pay, satisfy
5 or purchase all or part of an indebtedness or obligation secured by a mortgage or lien
6 upon real property.”⁵ NRS § 40.495(2). The statute further provides that “[i]f the obligee
7 maintains an action to foreclose or otherwise enforce a mortgage or lien and the
8 indebtedness or obligations secured thereby, the guarantor . . . may assert any legal or
9 equitable defenses provided pursuant to the provisions of NRS 40.451 to 40.4639,
10 inclusive.” NRS § 40.495(3). Defendants contend that they are entitled to assert
11 equitable defenses that appear in NRS §§ 40.451 to 40.4639. Plaintiff, conversely,
12 argues that the Property’s sale — which occurred during the Borrower’s bankruptcy
13 proceeding — does not constitute “maintain[ing] an action to foreclose or otherwise
14 enforce a mortgage or lien.” NRS § 40.495(3).

15 In *Lavi v. Eighth Judicial District Court*, 325 P.3d 1625 (Nev. 2014), the Nevada
16 Supreme Court explained that the defenses described in NRS § 40.495(3) applied to an
17 action that a creditor initiated against a guarantor before foreclosing on the underlying
18 property. The court explained that “[a]lthough [the creditor] commenced an action on the
19 guaranty first under NRS 40.495(2), once it foreclosed on the property and sought a
20 deficiency judgment, it was required to satisfy [certain timing requirements in] NRS
21 40.455.” *Id.* at 1268. The court further reasoned that this reading of NRS § 40.495(3)
22 “can be fairly harmonized with” NRS § 40.495(4), a recently added subsection that
23 requires courts to determine a property’s fair market value if a creditor brings an action
24 against a guarantor before a foreclosure sale. *Lavi*, 325 P.3d at 1268. The *Lavi* court
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26 ⁵A creditor may bring such a separate action so long as a guarantor has waived
27 the so-called one-action rule, which limits creditors to bringing one action to satisfy debt.
28 NRS § 40.430, *amended by* 2015 Nev. Stat., Ch. 518, Sec. 5.5 (Westlaw); *Lavi v. Eighth
Judicial Dist. Court*, 325 P.3d 1265, 1267–68 (Nev. 2014). The parties do not appear to
dispute that the one-action rule has been waived.

1 thus made clear that a guarantor can assert equitable defenses even where a creditor
2 goes after a guarantor before foreclosing on the underlying property. But the case did
3 not determine whether the sale of a property pursuant to a Chapter 11 bankruptcy gives
4 rise to the same equitable defenses.

5 Defendants have not demonstrated that Plaintiff “maintain[ed] an action to
6 foreclose or otherwise enforce a mortgage or lien” against the Property.⁶ NRS
7 § 40.495(3). Defendants point to the foreclosure action that Plaintiff commenced in
8 Illinois about a week after the Borrower filed for bankruptcy as evidence that Plaintiff
9 maintained a foreclosure action. That action, however, was subject to an automatic stay
10 from its outset. The Court is not persuaded by Defendants’ argument that commencing a
11 foreclosure action during the pendency of a bankruptcy proceeding qualifies as
12 “maintain[ing] an action to foreclose.” NRS § 40.495(3). It is undisputed that the Property
13 was sold in the context of the Borrower’s bankruptcy proceeding, which the Borrower
14 had initiated. Plaintiff’s participation in the Borrower’s bankruptcy proceeding was
15 defensive and for the purposes of protecting its creditor’s lien. Moreover, the fact that the
16 Property’s sale was the result of a settlement agreement between Plaintiff and the
17 Borrower does not transform the sale into a creditor-driven action to enforce a mortgage.
18 *Cf. U.S. Bank Nat’l Ass’n v. Palmilla Dev. Co., Inc.*, 343 P.3d 603, 606-07 (Nev. 2015)
19 (holding that a receiver sale in an action instituted by a creditor qualified as a foreclosure
20 sale); *Walters v. Eighth Judicial Dist. Court*, 263 P.3d 231, 232–33 (Nev. 2011) (applying
21 equitable defenses to a trustee’s sale). Nor did Plaintiff’s attempt to seek relief from the
22 automatic stay. Indeed, Plaintiff’s settlement agreement with the Borrower indicates that
23 Plaintiff’s attempt to proceed in a separate foreclosure action was unsuccessful, and that
24 the action was not maintained. In short, Plaintiff’s initiation of the foreclosure action that
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26 ⁶Both parties rely on unpublished decisions by the Nevada Supreme Court to
27 argue their respective positions. Under Nevada Supreme Court Rule 123, “[a]n
28 unpublished opinion or order of the Nevada Supreme Court shall not be regarded as
precedent and shall not be cited as legal authority except” in instances not applicable
here. Accordingly, the Court will not address those opinions here.

1 was then subject to an automatic stay does not satisfy NRS § 40.495(3)'s requirement
2 that Plaintiff "maintain[] an action to foreclose or otherwise enforce a mortgage or lien."
3 Defendants have not shown that they are entitled to the affirmative defenses
4 enumerated NRS § 40.495(3).

5 **b. Six-Month Limitation Under NRS § 40.455(1)**

6 Even assuming that Plaintiff's filing of the foreclosure action triggered NRS
7 § 40.495(3), the Court nevertheless finds that the six-month limitation period in NRS
8 § 40.455(1) is inapplicable to the sale here. Section 40.455(1) instructs courts to award a
9 deficiency judgment if, "upon application of the judgment creditor or the beneficiary of
10 the deed of trust within 6 months after the date of the foreclosure sale or the trustee's
11 sale held pursuant to NRS 107.080, respectively," the amount of indebtedness exceeds
12 the proceeds of the sale. NRS § 40.455(1). Defendants contend that Plaintiff failed to
13 make a requisite application for a deficiency judgment within six months of the Property's
14 sale. Plaintiff insists that NRS § 40.455(1) does not apply to the Property's sale because
15 the provision covers only foreclosure and trustee's sales and the Property was not sold
16 through either a foreclosure sale or a trustee's sale. The Court agrees with Plaintiff.

17 Because neither party contends that a trustee's sale has occurred in this case
18 (see dkt. no. 87 at 6), the Court need only determine whether the Property's sale
19 qualifies as a foreclosure sale. As another court in this district recently noted, "[a] sale by
20 the debtor-in-possession in bankruptcy is not a foreclosure sale under Nevada law,"
21 which defines a foreclosure sale as "'the sale of real property to enforce an obligation
22 secured by a mortgage or lien on the property.'" *Branch Banking & Trust Co. v. Rad*, No.
23 2:14-cv-01947-APG, 2015 WL 5664393, at *7 (Sept. 24, 2015) (quoting NRS §
24 40.462(4)). Here, just as in *Rad*, the Property was sold as part of the Borrower's
25 bankruptcy proceeding, not through a creditor-driven action to enforce the Mortgage.
26 See *id.* at *3.

27 During oral argument, Defendants attempted to distinguish *Rad* by pointing out
28 that the creditor in that case had objected to the sale in the bankruptcy proceeding,

1 whereas the Property in this case was sold pursuant to a settlement agreement between
2 Plaintiff and the Borrower. But Defendants have not clarified why the fact that Plaintiff
3 had settled with the Borrower makes any difference — the Property was still sold as part
4 of the Borrower's bankruptcy proceeding, not through a creditor-directed enforcement
5 action. See *In re DRW Prop. Co* 82, 57 B.R. 987, 992 (Bankr. N.D. Tex. 1986)
6 ("Unquestionably, a foreclosure sale is not encompassed within a Section 363 [federal
7 bankruptcy] sale."). Under Defendants' logic, a guarantor could gain undue benefit from
8 a borrower's bankruptcy filing by asserting equitable defenses that protect against
9 dilatory tactics that creditors might employ in a foreclosure action. Defendants' attempt to
10 recast a bankruptcy sale as a creditor's foreclosure action is unpersuasive. See *Star*
11 *Phoenix Mining Co. v. W. One Bank*, 147 F.3d 1145, 1147 n.2 (9th Cir. 1998) ("It is also
12 well-established that the discharge of the principal debtor in bankruptcy will not
13 discharge the liabilities of codebtors or guarantors.")). The Property's sale by the
14 Borrower in their bankruptcy proceedings, even though made pursuant to an agreement
15 with Plaintiff, is not a foreclosure sale that triggers the six-month limitation period in NRS
16 § 40.455(1). Accordingly, the Court finds that the six-month period in NRS § 40.455(1)
17 does not apply here.

18 **c. Valuation Cap Under NRS § 40.459(1)(c)**

19 Defendants further argue that Plaintiff cannot recover a deficiency judgment
20 because Defendants never identified the amount of consideration they paid for the right
21 to obtain a deficiency judgment in this matter. Defendants point to NRS § 40.459(1)(c),
22 which, at the time of the Property's sale in July 2013, provided:

23 If the person seeking the judgment acquired the right to obtain the
24 judgment from a person who previously held that right, [a deficiency
25 judgment could be limited to] the amount by which the amount of the
26 consideration paid for that right exceeds the fair market value of the
 property sold at the time of sale or the amount for which the property was
 actually sold, whichever is greater.

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1 2011 Nev. Stat. 1743. If this provision applies here, then Plaintiff would not recover a
2 deficiency judgment unless Plaintiff paid more to acquire the right to a deficiency
3 judgment than the Property's sale price or fair market value.

4 This Court recently held that the federal Financial Institutions Reform, Recovery
5 and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1811 *et seq.*, preempts NRS §
6 40.459(1)(c). *Branch Banking & Trust Co. v. Rossal*, No. 2:12-cv-01298-MMD-GWF
7 (Sept. 29, 2015). There, the Court was persuaded by reasoning in *Munoz v. Branch*
8 *Banking*, 348 P.3d 689, 692–93 (Nev. 2015), in which the Nevada Supreme Court
9 determined that NRS § 40.459(1)(c) interferes with the FDIC's statutory obligations to
10 protect depositors by disposing of a failed bank's assets. The same reasoning applies
11 here. Plaintiff has offered evidence demonstrating that it obtained the right to seek a
12 deficiency judgment from the FDIC, which had distributed that asset in its role as
13 receiver for Colonial Bank. (See dkt. no. 85-2 at 12–25.) Applying NRS § 40.459(1)(c) in
14 this case would interfere with the FDIC's ability to liquidate and distribute Colonial Bank's
15 assets, and, in turn, protect depositors.

16 Coupled with Plaintiff's evidence showing a difference between the Property's
17 sale price and the amount of indebtedness at the time of sale, the Court finds that
18 Plaintiff has established that a deficiency exists. (See, e.g., dkt. no. 85-1 at 8 (stating that
19 the Note's principal amount is \$4,333,000); dkt. no. 87-3 at 4 (order approving sale of
20 Property for \$3,425,000). Defendants, moreover, have not shown that they are entitled
21 to summary judgment on this issue.

22 **3. Factual Disputes Regarding Defendants' Affirmative Defenses**

23 Finally, Defendants urge the Court to deny Plaintiff's Motion because factual
24 disputes allegedly exist with regard to Defendants' affirmative defenses. Defendants
25 offer testimonial evidence from two witnesses suggesting that an oral agreement existed
26 between the parties. (Dkt. no. 91 at 16–17.) The Court finds that this evidence is
27 insufficient to create a genuine dispute of material fact. See *Bhan*, 929 F.2d at 1409. In
28 June 2014, the Court dismissed a counterclaim Defendants had raised, finding that the

1 alleged oral agreement between the parties was unenforceable under the statute of
2 frauds. (Dkt no. 70.) The only evidence Defendants have offered to demonstrate a
3 genuine issue of material fact implicates the same alleged oral agreement. In light of the
4 Court's earlier dismissal order, the Court finds that no genuine dispute of material fact
5 exists. The Court will therefore grant Plaintiff's Motion.

6 **IV. MOTION FOR VALUATION HEARING**

7 Plaintiff moves for a valuation hearing pursuant to NRS § 40.495(4). (Dkt. no. 86.)
8 Because the Court grants summary judgment for Plaintiff on its claim for breach of
9 guaranty, the Court will set a valuation hearing.

10 **V. CONCLUSION**

11 The Court notes that the parties made several arguments and cited to several
12 cases not discussed above. The Court has reviewed these arguments and cases and
13 determines that they do not warrant discussion as they do not affect the outcome of the
14 parties' motions.

15 It is ordered that Plaintiff's Motion for Partial Summary Judgment (dkt. no. 85) is
16 granted.

17 It is further ordered that Plaintiff's Application for Valuation Hearing (dkt. no. 86) is
18 granted. The Court will set a hearing to determine the fair market value of the Property at
19 the time this action was commenced.

20 It is further ordered that Defendants' Motion for Summary Judgment (dkt. no. 87)
21 is denied.

22 DATED THIS 16th day of October 2015.

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25 _____
26 MIRANDA M. DU
27 UNITED STATES DISTRICT JUDGE
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